



SASKATCHEWAN
HUMAN RIGHTS
COMMISSION

August 12, 2019

THIS IS EXHIBIT "I" REFERRED TO IN THE
AFFIDAVIT OF Gregory Burke
SWORN BEFORE ME AT THE CITY OF
SASKATOON, IN THE PROVINCE OF
SASKATCHEWAN THIS 7th DAY OF
October A.D. 2019

A COMMISSIONER FOR DATHS in and for the
Province of Saskatchewan.
My commission expires _____
- or - Being a Solicitor

✓MLT Aikins LLP
1500, 410 – 22nd Street East
Saskatoon SK S7K 5T6
Attention: Kevin C. Wilson, Q.C.

And

McKercher LLP
374 Third Avenue South
Saskatoon SK S7K
Attention: Paige E. Van de Sype

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SASKATOON

AUG 14 2019

MLT Aikins LLP

And

Cuelenaere LLP
Suite 200, 450 – 2nd Avenue North
Saskatoon SK S7K 2C3
Attention: Jay D. Watson

Dear Messrs. Wilson and Watson and Ms. Van de Sype:

Re: [REDACTED] v. The Saskatoon Gallery and Conservatory
Corporation / The Art Gallery of Saskatchewan Inc. and Gregory
Burke
Our File: 15-16-241

This matter has now been considered at Case Management. I have considered the Investigator's Disclosure Report and the responses of the parties. The Respondents have objected to the production or inclusion of certain documents that were requested during the investigation. For the reasons that follow, I have decided that additional investigation is required.

Pattern and Practice Evidence

Should this matter be referred to hearing, the court is entitled, pursuant to section 35(4) of *The Saskatchewan Human Rights Code, 2018* (the "Code") to receive and accept evidence led for the purpose of establishing a pattern or practice of resistance to or disregard or denial of any of the rights secured by the Code. Section 35(4)(b) states that in arriving at its decision, the Court may place any reliance that it considers appropriate on the evidence and on any pattern or practice disclosed by the evidence.

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SCANNED

The Respondent organization's position is that certain witness allegations have been previously investigated, are not part of the formal complaint, and do not relate to the Complainant herself. The Respondent organization takes the position that these allegations are not probative but are instead prejudicial and should be excised from the Disclosure Report.

The weight, if any, to be given to such evidence is for the Court to determine at hearing, pursuant to section 35(4) of the *Code*. Evidence of pattern or practice is not required to form part of the formal complaint or to relate directly to the Complainant herself, in order to be considered by the Court.

[REDACTED] evidence is that she was undermined and treated poorly by Gregory Burke. Evidence from [REDACTED] and female witnesses interviewed to date is that Burke's alleged treatment of [REDACTED] may be part of a larger pattern and practice of behaviour whereby he is alleged to treat women, particularly women managers, differently from men. The evidence of female witnesses beyond the Complainant is central to any determination of pattern or practice.

Effect of Outside Investigations

As set out in *Peng v University of Saskatchewan* 2014 SKCA 98, allegations previously investigated by a third party are not immune from consideration by the Commission, and the Commission is not required to accept outside investigations. I may review prior investigations and assessments of complaints by third parties to evaluate whether there is any reasonable likelihood that the Commission's further investigation will reveal evidence of a contravention under the *Code*. The Commission will consider the circumstances surrounding each complaint as a whole.

There are a number of concerns with the investigation reports provided. The October 18, 2018 and December 5, 2018 City Ombudsperson Reports are both titled "Investigation Summary Report". These documents appear to be summary in nature. The reports are under four pages and approximately two pages in length. The reports make conclusions, and list general allegations, but do not detail specific allegations. The Commission will require full investigation files in order to assess the impact of these investigations.

The February 10, 2015 and April 4, 2016 workplace harassment investigations of [REDACTED] interviewed limited witnesses and reviewed limited documents. The [REDACTED] are not wholly independent, because they were carried out by an investigator retained and presumably compensated by the Respondent Board. Unlike in *Peng*, the complainants do not appear to have endorsed the investigator in any way. The [REDACTED] in ascertaining whether there has been any violation of applicable legislation, make

no reference to the *Code*, and do not make any specific finding as to whether or not there has been a violation of the *Code*.

The [REDACTED] do not cover all of the same issues that would be investigated in the Commission's process, including whether or not the Respondents exhibited a pattern or practice of discrimination on the basis of sex. In the [REDACTED] the allegations against Burke included that he exhibited "sexist" behaviour and that female colleagues, especially those in leadership roles, were undermined and intimidated by him. One of the complainants stated her belief that Burke exhibited a pattern in how he treated assertive women. It appears that these allegations were not taken seriously, and were not addressed as possible harassment in the [REDACTED]. In the face of these allegations, the investigator did not interview any female witnesses, or assess the overall workplace environment. In fact, rather than performing any investigation into these allegations, the investigator states of one complainant that she *interpreted* events, including the previous resignation of a female employee, in such a way as to create a pattern of poor treatment by Burke toward assertive women, and goes on to label her allegations as "hearsay" and "extrapolation". The [REDACTED] consider the individual harassment complaints in isolation, and do not consider the possibility of a pattern of subtle undermining behaviour on the basis of gender in the workplace.

The [REDACTED] in certain instances, appear to accept Burke's evidence over that of the complainants. The reports are similar to many harassment investigation reports that are reviewed by the Commission. The parties put forward differing versions of what occurred in the workplace. The investigator concludes that the allegations are unsubstantiated, in part because the complainants have no evidence corroborating the allegations. This essentially places an improper onus on a complainant to provide corroboration for the alleged harassment. The [REDACTED] give no explanation for preferring Burke's version of events on certain issues. The reports provide no explanation, other than lack of corroboration, for concluding that certain complaints are unsubstantiated. On these points, the investigator could have easily reached the opposite conclusion.

In applying an "objective standard" to all allegations, the [REDACTED] fail, in respect of any sexual harassment allegations, to apply the "reasonable woman" test as set out in human rights law. See: *Stadnyk v Canada (Employment and Immigration Commission)*, 2000 CanLII 15796 (FCA) at para 25. [REDACTED] finds that Burke's acts were within his managerial authority, but does not consider that acts within management authority can be carried out in a harassing or gendered manner under the *Code*. Davies finds that one of the complainants "has had to place a specific interpretation on Mr. Burke's comments or actions in order to find them "condescending, intimidating and sexist""", seemingly suggesting that the complainant's interpretation is unreasonable, without

August 12, 2019

Page 4

considering whether her perspective might reflect that of the “reasonable woman”.

Although there are cases where it is appropriate to rely on the conclusion reached through an employer’s outside investigation, I must also consider the potential inequity of allowing an employer to immunize itself from liability under the *Code*. See: *Niagara (Regional Police Services Board)*, 2013 SCC 19.

The Commission has a duty to complete a thorough, professional, and neutral investigation. A thorough investigation in this case requires the Commission to make numerous factual findings and to assess the very investigations raised by the Respondents. It appears that credibility will be key in assessing the veracity of the allegations of sexual harassment. For all of the reasons set out above, it is not appropriate for me to rely on the conclusions reached in the outside reports provided. The allegations raised in these reports are relevant to pattern or practice under section 35(4) of the *Code*. Further investigation of these issues is warranted.

Investigator Dubray will be in contact shortly to complete additional investigation in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "DA".

David Arnot
Chief Commissioner